Filed 6/2/04 In re Gillian F. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re GILLIAN F., A Person Coming Under the Juvenile Court Law.

MONTEREY COUNTY DEPARTMENT OF SOCIAL SERVICES,

H026249

Plaintiff and Respondent,

(Monterey County Super. Ct. No. J36377)

v.

NICOLE S.,

Defendant and Appellant.

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The juvenile court terminated the parental rights of appellant Nicole S. to her daughter Gillian F. after a permanency planning hearing at which the court found that Gillian was adoptable. Ms. S. appeals and contends that she was denied her right to a contested permanency planning hearing.[1] For the reasons stated below, we affirm.

[1] Gillian's father, Bradley F., Sr. is not a party to this appeal.

I. Statement of Facts

On July 3, 2001, the Monterey County Department of Social Services (Department) filed a petition under Welfare and Institutions Code section 300, subdivision (b)[2] and alleged that Gillian had been born with a positive toxicology screen for methamphetamine; that she was medically fragile; that her parents had failed to seek substance abuse treatment; that they failed to visit her in the hospital; and that they failed to complete a MediCal application that was necessary for payment of her medical care. On July 6, 2001, the juvenile court ordered that Gillian and her 19-month-old brother Bradley be detained.[3]

In her report for the jurisdictional and dispositional hearing, the social worker recommended that Gillian and Bradley be removed from their parents' physical custody, that appellant receive reunification services, and that the children's father not be offered services. The report stated that both children had been born with positive toxicology screens for methamphetamine. After Gillian's birth, appellant, who was 24 years old, expressed concern as to her ability to parent two small children. Appellant had an extensive history of substance abuse, beginning when she was 16 years old. According to the report, Gillian was born with an H-type tracheoesophageal fistula that interfered with her ability to tolerate feedings. Though the condition was surgically repaired, Gillian required ongoing medical care, and was referred to the High Risk Infant Development Program.

At the conclusion of the jurisdictional and dispositional hearing on August 31, 2001, the juvenile court declared Gillian a dependent of the court, ordered reunification services to appellant, and denied services to Mr. F.

In her report for the six-month review hearing of March 1, 2001, the social worker recommended that Bradley be returned to appellant, that Gillian remain in

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[2] All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

out-of-home placement, and that appellant continue to receive reunification services. Gillian remained medically fragile and required intensive monitoring. She attended nine medical appointments between September 28, 2001 and February 19, 2002. Gillian had hearing loss in one ear as well as respiratory problems that caused her pediatrician to direct that she not be exposed to secondhand smoke. Appellant was in a residential drug treatment program, and her counselor reported that she was meeting program requirements. She had also completed a parenting class. However, Gillian was traumatized by her visits with appellant. Following the hearing, the juvenile court followed the Department's recommendations.

In her report for the 12-month review hearing of September 6, 2002, the social worker recommended that appellant's reunification services be terminated and the matter set for a permanency planning hearing. She also recommended that Bradley remain with appellant, who was residing in a transitional housing program. Gillian's medical problems continued to require frequent medical appointments, and her physical development was delayed. Gillian cried when her foster mother was not present. Appellant had tested negative for drugs for over a year, and continued to participate in an outpatient drug program. Appellant's counselor believed that appellant could overcome the bonding issue with Gillian, and that appellant was not assertive about her daughter's medical needs due to her "lack of life experiences." During the review period, appellant had attended only three of the scheduled fifteen appointments for Gillian. The social worker was concerned about appellant's lack of participation at the appointments that she did attend and her inability to grasp the severity of Gillian's medical condition. Appellant had told the social worker on several occasions that she was uncertain as to whether she could meet her daughter's medical needs.

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[3] Bradley was returned to appellant's physical custody and is not a subject of this appeal.

Dr. Elaine Finnberg conducted a psychological evaluation of appellant. In her report, Dr. Finnberg stated that appellant did not suffer from a major psychiatric disorder. However, Dr. Finnberg stated that appellant was "less emotionally mature than would be expected," suffered from "longstanding depression and her emotional development ha[d] been severely stunted by unresolved grief from her mother's death and drug abuse." Dr. Finnberg was unable to determine whether appellant was emotionally stable enough to parent Gillian. In order to resolve this question, she recommended that reunification services be continued and that appellant have greater contact with Gillian.

On November 12, 2002, the Department filed an addendum report for the 12-month review hearing. Based on Dr. Finnberg's recommendation and the progress that appellant had made in the last two months, the social worker recommended additional reunification services. Appellant had obtained reliable transportation, attended Gillian's last four medical appointments, and been responsible for arranging her most recent appointments. Gillian also no longer cried during visits, which were twice a week for six or seven hours. The juvenile court ordered that reunification services be continued.

In her report for the 18-month review hearing of January 3, 2002, the social worker recommended termination of appellant's reunification services and the setting of a section 366.26 hearing. Appellant had been present for all of Gillian's medical appointments, but the social worker remained concerned that she would be able to care for her daughter. Appellant was unable to fill out medical documents for Gillian without the foster mother's assistance, and was unable to fill out a health questionnaire for her. She failed to include Gillian's most serious medical conditions and past health problems. Despite being given a medical binder to review for a one-week period, appellant failed to include one-third of the appointments that Gillian would need in the coming year. Appellant was also unable to coordinate medical procedures. The social worker noted that appellant

had difficulty following a simple schedule, and she believed that the addition of a medically fragile child to a schedule that would include caring for another child, work, therapy, and a recovery program would be more than appellant could handle. Thus, though appellant had made some progress, the social worker recommended termination of services.

A contested 18-month hearing was held. The social worker testified that Gillian had multiple health problems and her respiratory problems were life-threatening. The social worker also expressed concern that appellant had left Bradley in the care of people with Child Protective Services histories and that she was unable to provide sufficient information about Gillian's medical history.

Dr. Finnberg testified that she met with appellant prior to testifying and that her findings were unchanged. She noted that appellant was passive, but was learning to be more assertive. In Dr. Finnberg's opinion, appellant would be able to adequately care for Gillian.

The foster mother testified as to the extensive medical care that Gillian needed.

At the conclusion of the hearing, the juvenile court found that it would be detrimental to return Gillian to appellant and set the matter for a permanency planning hearing.

In her report for the permanency planning hearing of May 23, 2003, the social worker recommended termination of parental rights and adoption of Gillian. The report stated that Gillian was strongly attached to her current caregivers, who were the prospective adoptive parents. She had lived with them since she was discharged from the hospital. During the review period, appellant had agreed to visit Gillian twice a month for two hours. However, the last four scheduled visits had been cancelled or postponed at appellant's request. The social worker noted that the prospective adoptive parents and appellant had "worked together in a way that has been beneficial to the child." The prospective adoptive parents had

assisted in maintaining contact with Bradley and were open to continuing this contact. The social worker also concluded that Gillian was an adoptable child despite her medical needs.

The matter was before the juvenile court for a permanency planning hearing on May 23, 2003. The juvenile court denied appellant's request for a contested hearing, terminated appellant's parental rights and ordered adoption as the permanent plan.

II. Discussion

Appellant contends that she was denied her due process right to a contested permanency planning hearing. She contends that she was entitled to present evidence on the statutory exceptions to adoption.[4]

Appellant relies on *In re James Q.* (2000) 81 Cal.App.4th 255 in which the Third District held that a juvenile court "may not, consistent with the requirements of statute and principles of due process, deny a party the right to a contested review hearing based on an allegedly inadequate or even a nonexistent offer of proof." (*James Q.* at p. 258.) The juvenile court in *James Q.* denied a request by the mother's attorney for a contested six-month review hearing where the issue was whether reunification services should be extended. (*James Q.* at p. 259.) The mother's attorney stated that he wished to present the mother's testimony and cross-examine the social worker. (*James Q.* at p. 259.) The Third District held that the juvenile court's denial of a hearing violated the mother's right to due

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[4] Adoption is the preferred permanent plan "unless the court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances . . . [¶] (A) The parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship . . . . (E) There would be substantial interference with a child's sibling relationship . . . ." (§ 366.26, subd. (c)(1).) "[T]he burden is on the party seeking to establish the existence of one of the section 366.26, subdivision (c)(1) exceptions to produce that evidence." (*In re Megan S.* (2002) 104 Cal.App.4th 247, 252.)

process. "As a matter of statutory construction and constitutional due process, we conclude the juvenile court cannot require a party to a review hearing to tender an offer of proof as a condition to obtaining a contested hearing. A party must be able to make its best case, untrammeled by evidentiary obstacles arbitrarily imposed by the courts without legislative sanction." (*James Q.* at p. 266, citations omitted.) The Third District explicitly distinguished cases in which reunification services had already been terminated. (*James Q.* at p. 267.)

In *In re Kelly D.* (2000) 82 Cal.App.4th 433, the Third District extended *James Q.*'s holding to post-permanency planning review hearings, noting that reunification was still an option at the post-permanency planning review hearing, because the child had been placed in long term foster care. (*Kelly D.* at p. 438-439.)

In April 2002, Division Four of the Second District held in *In re Tamika T.* (2002) 97 Cal.App.4th 1114 that "a trial court does not deny due process if it requires a parent to make an offer of proof before it conducts a contested [permanency planning] hearing on the issue of whether a parent can discharge his or her burden of establishing a statutory exception to termination of parental rights." (*Tamika T.* at p. 1116.) The mother in *Tamika T.* claimed that she was entitled to a contested permanency planning hearing regardless of her offer of proof. (*Tamika T.* at p. 1121.) The Second District disagreed, stating "[b]ecause due process is … a flexible concept dependent on the circumstances, the court can require an offer of proof to insure that before limited judicial and attorney resources are committed to a hearing on the issue, mother had evidence of significant probative value. If due process does not permit a parent to introduce irrelevant evidence, due process does not require a court to hold a contested hearing if it is not convinced the parent will present relevant evidence on the issue he or she seeks to contest. The trial court can therefore exercise its power to request an offer of proof to clearly identify the contested issue(s) so it can

determine whether a parent's representation is sufficient to warrant a hearing involving presentation of evidence and confrontation and cross-examination of witnesses." (*Tamika T.* at p. 1122.)

The Second District distinguished *James Q.* and *Kelly D.* and disagreed with the reasoning of *James Q.*[5] (*Tamika T.* at pp. 1122-1123.) "A proper offer of proof gives the trial court an opportunity to determine if, in fact, there really is a contested issue of fact. The offer of proof must be specific, setting forth the actual evidence to be produced, not merely the facts or issues to be addressed and argued. If the trial court finds the offer of proof insufficient and declines to hold a contested hearing, the issue is preserved for appeal so that a reviewing court can determine error and assess prejudice. [Citation.] This procedure adequately protects a parent's rights." (*Tamika T.* at p. 1124.)

We generally agree with the reasoning of *Tamika T.* A juvenile court does not violate a parent's right to due process by requiring the parent to specify the issue the parent wishes to contest at the permanency planning hearing and the evidence that they desire to present in order to determine whether there is any genuine issue of fact. Of course, a juvenile court may not use this mechanism to preclude a parent from obtaining a contested hearing on a genuine factual issue. The court may not refuse to hold a contested hearing if the parent is able to suggest the existence of any viable issue upon which he or she wishes to present evidence or cross-examine the social worker.

Here appellant's counsel requested that "the matter be set for a contested hearing, based on continued visitation and contact of the mother with the child and also based on the mother's worry that there will not be sibling contact after the adoption takes place." The juvenile court then stated: "I'm not sure I've heard a

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[5] Five months after publishing *Tamika T.*, Division Four of the Second District published *In re Josiah S.* (2002) 102 Cal.App.4th 403, in which it agreed with

basis for a contested hearing. Any comments concerning that subject?" Counsel for the Department noted that there had been much cooperation between appellant and the prospective adoptive parents in allowing both appellant and Bradley to visit Gillian. Appellant's counsel responded that appellant was concerned that, based on other cases, contact would not be allowed once the adoption was final. She also stated: "And in termination of parental rights, you have to take into consideration the sibling bond, and you also have to take into consideration the fact that this mother has continued to have contact with this child the whole time. She was having overnights before her services were terminated. So her daughter Gillian definitely knows her, has spent a lot of time with her, and therefore that's something that has to be taken into consideration, as well as the sibling bond, for termination of parental rights." Counsel for the Department acknowledged that appellant had had continued contact and visits during the dependency, but that she had not functioned as Gillian's parent. The juvenile court concluded that there was no basis to hold a contested hearing.

Appellant concedes that she failed to make an offer of proof. However, she asserts that the juvenile court not only failed to request an offer of proof, but was also not interested in hearing one. We disagree with appellant's characterization of the record. Though the court did not use the words "offer of proof," it did ask appellant's attorney the basis for a contested hearing. Counsel then referred to the fact that appellant had spent a lot of time with Gillian, including overnight visitation before the termination of reunification services, her fear that there would be no contact after adoption, and the existence of a sibling bond. Here though appellant's attorney stated the issue, she reiterated what was contained in the social worker's report, that is, that appellant and Bradley continued to have contact with Gillian. However, she failed to state why or how evidence of this

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both *Kelly D.* and *James Q.* in a case, like *Kelly D.*, involving a post-permanency planning review hearing. *Josiah S.* did not mention *Tamika T.*

contact would preclude termination of parental rights. Accordingly, the juvenile court did not err in failing to conduct an evidentiary hearing.

Even assuming that the juvenile court erred, it did not result in a miscarriage of justice. "A miscarriage of justice should be declared only when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.)

It is the parent's burden to establish that termination of parental rights would be detrimental to the child. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343.) Here the only issues that appellant could have raised were whether she met the beneficial relationship and the sibling relationship exceptions to the termination of parental rights.

To meet the beneficial relationship exception, a parent must have maintained regular visitation and the child would benefit from continuing the relationship. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(A).) Assuming that appellant had maintained regular visitation, she could not demonstrate on this record that Gillian would benefit from continuing the relationship. A parent must show that his or her "relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) A parent must show that the child would be "greatly harmed" by terminating parental rights. (*Ibid.*) Here Gillian F., a medically fragile child, has never lived with appellant. In fact, appellant had difficulty maintaining a visitation schedule of two hours twice a month. Thus, appellant has never functioned as a parent for Gillian, and cannot establish Gillian would be greatly harmed by the termination of parental rights.

Appellant also cannot meet the sibling bond exception. Section 366.26, subdivision (c)(1)(E) states: "There would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." Here Bradley was 19 months old when Gillian was born. They have never lived together, and thus have not shared significant common experiences or developed strong bonds. While they may enjoy each other's company, the permanent plan of adoption would not substantially interfere with their relationship. Thus, we find that it is not "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Pool v. City of Oakland*, *supra*, 42 Cal.3d 1051, 1069.)

III. Disposition

The order is affirmed.

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Mihara, J.

I CONCUR:

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Bamattre-Manoukian, Acting P.J.

Concurring opinion of McAdams, J.

I concur in the judgment. I agree that it is not " 'reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error.' [Citation.]" (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.)

I write separately to express my general concern over the use of offers of proof in Welfare and Institutions Code section 366.26[1] hearings, as sanctioned by *In re Tamika T.* (2002) 97 Cal.App.4th 1114, and my specific unease with the procedure employed in this case.

Section 366.26, subdivision (b) provides that the juvenile court "shall receive other evidence that the parties may present." And section 366.26, subdivision (c)(1) refers to a determination based on the social worker's assessment and "any other relevant evidence." Notwithstanding this statutory language, I agree with the general proposition expressed in *Tamika T.* that a juvenile court does not violate a parent's right to due process by requiring an offer of proof before conducting a hearing under section 366.26.

My general concern arises from the risks and dangers in the process of presenting and evaluating such offers of proof in this context. The majority acknowledges that the court should not use the requirement of an offer of proof to "preclude a parent from obtaining a contested hearing on a genuine factual issue." (Maj. opn. at p. 8.) In my view, there is a legitimate risk of exactly such preclusion if the court sets too high a threshold or requires undue specificity in an offer of proof. Therefore it is my position that a parent is entitled to a contested hearing upon making a general offer to present evidence that falls within one or

[1] Subsequent statutory references are to the Welfare and Institutions Code unless otherwise specified.

more of the "circumstances" under which the court could determine that termination of parental rights would be detrimental to the child, as set forth in section 366.26, subdivisions (c)(1)(A)-(E). The trial court can then regulate the hearing appropriately through its power to actively control trial proceedings (see, e.g., Code Civ. Proc., § 128, subd. (a)(3)) and through its duty to make evidentiary rulings, obviously including limiting the presentation to relevant evidence.

More specifically, I wish to express my concern over the proceedings in this case. I have difficulty finding that there was an *opportunity* for an adequate offer of proof here. The court's "any comments?" question is answered by *county counsel* first, followed by very brief comments by appellant's counsel. Counsel for the child spoke next, followed by an attorney representing the adopting parents. After that, an exchange occurred between county counsel and the court. Then the court ruled. *Tamika T.* requires a greater opportunity to be heard. Furthermore, at the outset, counsel requested a contested hearing and raised the issues of "sibling bond" and "continuing contact"; both are recognized statutory "circumstances" that contravene termination. (§ 366.26, subd. (c)(1)(E) & § 366.26, subd. (c)(1)(A).) This statement should have satisfied the court that appellant wished to present relevant evidence.

I acknowledge that limited judicial resources should not be consumed or burdened by unnecessary proceedings, that dependency matters must be heard with dispatch, and that the range of potential issues are limited by the time a case reaches the section 366.26 stage, but these factors cannot justify the denial of a parent's fundamental right to be heard.

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McAdams, J.